

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1976

No. 76-284

SUN SHIPBUILDING & DRY DOCK COMPANY, *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

On Petition for a Writ of Certiorari to the Court of Claims

**BRIEF OF UNITED STATES LINES, INC.
IN OPPOSITION**

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**BRIEF FOR THIRD PARTY UNITED STATES
LINES, INC. IN OPPOSITION**

—
OPINIONS BELOW

The Order of the Court of Claims is set forth in the Appendix to the Petition at Pages A 2-A 4. The Opinion and Recommended Decision of Trial Judge Mastin G. White is set forth in the Appendix to the Petition at pages A 5-A 25. The Orders of the Secretary of Commerce on review are set forth at pages A 26-A 30 of the Appendix to the Petition. The final Opinion and Order of the Maritime Subsidy Board are set forth at pages A 31-A 119 of the Appendix. The Recommended Decision of Paul M. Pfeiffer, Chief Hearing Examiner is set forth at pages A 120-A 214 of the Appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

STATUTE INVOLVED

Section one of the Wunderlich Act (68 Stat. 81, 41 U.S.C. Sec. 321) is set forth in the Appendix to SUN's petition at page A 1.

QUESTION PRESENTED

Whether the Court of Claims significantly misapplied the substantial evidence test in finding that the Final Administrative Award of change costs to SUN was supported by substantial evidence on two contested factual issues.¹

STATEMENT OF THE CASE

On October 10, 1962, a tripartite construction contract (No. MA/MSB-11) for the building of 5 vessels under the Construction Differential Subsidy Program was executed by United States Lines, Inc. (USL) (as the Owner), SUN Shipbuilding and Dry Dock Company (SUN) (as the Contractor) and the United States of America, acting through the Maritime Subsidy Board (the Board).

The contract had been let under the Maritime Administration's bid procedures and called for the completion of the basic contract work for \$10,590,000 per vessel (an aggregate contract price of \$52,950,000). Payment was to be made by USL (51.4%) and the

¹ While Petitioner has made reference to an additional factual issue (Pet. pp. 7, 8 and 28) it has limited in its argument to only two factual issues.

Board (48.6%), the government's portion being construction differential subsidy. (A 6)

SUN was obligated to deliver each of the 5 vessels on fixed contract delivery dates. (A 6)

At SUN's request the original sequence of delivering the first hull and the second hull was reversed. (A 110)

Sixteen days after Sun had laid the keel for the first of the five vessels, and 486 days before the contract delivery date for the first vessel, Change Order 23 was authorized and issued to automate the engine rooms on these vessels. (A 7) Pursuant to Article 4 of the contract SUN had provided a preliminary estimate of the change costs for automation at \$300,000 per vessel. (A 33) This estimate was an essential factor in USL's decision to seek Maritime Administration authority to order change No. 23.

A related modification in the size of the crew quarters was authorized and issued as change No. 48 based upon SUN's estimate that the reduction in crew quarters would cost only \$38,000 per vessel. (A 33) Again, authority to proceed with change No. 48 was premised on SUN's estimate of the cost. (A 141)

After delivery of the vessels (44, 33, 47, 48 and 60 days beyond the respective contract delivery dates)² SUN presented detailed revised estimates for basic change work and alleged delay associated costs, thereby raising its change cost claims from \$1,690,000 to \$5,740,368 (including 10% profit).

² The final administrative award of change costs excused these delays and relieved SUN from its contract obligation to pay liquidated damages for late delivery totaling \$510,400 (i.e., 232 delay days x \$2,200 per day in liquidated damages pursuant to Article V of the Contract Special Provisions).

THE PROCEEDINGS BELOW

As provided for in the contract, the Contracting Officer subsequently reviewed SUN's claim and determined that \$2,200,000 was the reasonable and recoverable amount for the change work (including profit). (A 8 and A 125)

Thereafter under the disputes clause a full *de novo* adjudicatory hearing on SUN's claim (which SUN had then escalated to \$6,688,893 (A 125)) was held by the Chief Hearing Examiner of the Maritime Subsidy Board who recommended a total award of \$3,732,863 which *inter alia* found based on the conflicting evidence of record, that SUN could not have delivered each vessel more than 15 days in advance of the contract delivery dates even if Change Orders 23 and 48 had never been issued. (A 192-A 204)

Exceptions were filed by all parties to the Recommended Decision and the Maritime Subsidy Board acting under the Disputes Clause reviewed the evidence of record, modified the recommended decision to result in an award of \$2,798,882.35, and in so doing, as here pertinent, found that even without change orders 23 and 48, SUN would not have delivered the vessels in advance of their respective contract delivery dates because of non-change related delay factors. (A 73-A 78)

Following Petitions For Review And Reconsideration the Secretary of Commerce reviewed the administrative determinations below and as here pertinent affirmed the decision of the Maritime Subsidy Board except to reinstate the 15 days of pre contract delivery date delay resulting in an award of \$3,070,547.95.

SUN filed a Petition in the Court of Claims alleging that the final Administrative Award of \$3,070,547.95

should have been "in excess of \$7,000,000" which amount SUN in its Motion for Summary Judgment reduced to \$4,379,656.95, an amount which would exceed the award below by \$1,309,109. Pursuant to a Motion of the United States, USL was noticed as a third party before the Court of Claims.

Upon Cross Motions For Summary Judgment, Judge White of the Trial Division of the Court of Claims issued Recommended Decision which, after examination of the record presented by the parties, determined that there was substantial evidence to support the determinations of the final administrative decision on all issues raised with the exception of the claim for "hire-fire" costs.

Upon requests for review and after oral argument the Court of Claims adopted the determination of the Trial Judge on all issues with the exception of the "hire-fire" claim, which it rejected, holding that the determinations of the Secretary of Commerce, insofar as properly challenged by the parties, were neither arbitrary, capricious, unsupported by substantial evidence, nor legally erroneous.

ARGUMENT

Petitioner, SUN, presents no special and important reasons for the exercise by this Court of its certiorari jurisdiction and for this Court's involvement in the detailed evidentiary record of this case which the Court of Claims, the Secretary of Commerce, the Maritime Subsidy Board and a Hearing Examiner have all considered.

In substance, Petitioner's assertions amount to nothing more than a disagreement with decision of the

Court of Claims and an attempt to have this Court reassess evidentiary issues previously determined. In asking this Court to "conclude that the determination by the Department of Commerce was not *correct*"³ SUN demonstrates its failure to understand the established function and standards of the "substantial evidence test" in Wunderlich Act review cases.

"As we said in *Consolo v. Federal Maritime Comm'n*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966), 'the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.' It is not for the court to strike down conclusions that are reasonably drawn from the evidence and findings in the case. Its duty is to determine whether the evidence supporting the Commission's findings is substantial, *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951)." (*Illinois Central R. Co. v. Norfolk & Western Ry. Co.*, 385 U.S. 57, 69, 87 S.Ct. 255, 262 (1966)).

SUN's claim that the Court of Claims has misapplied the substantial evidence test is not supported by SUN's citation of the decisions in *U.S. v. Carlo Bianchi & Co., Inc.* 373 U.S. 709, 715 (1963) and *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, (1951). There is no dispute that the term substantial evidence has become a term of art or that the substantiality of evidence must take into account whatever in the record detracts from its weight.

The Court of Claims was fully aware of the content of the substantial evidence test and its responsibilities under the Wunderlich Act as a reading of its Order

³ Petition at p. 10, emphasis added.

and the Opinion of the Trial Judge show. As stated there:

"For the purpose of the Wunderlich Act substantial evidence is 'such evidence as might convince a reasonable man, to support the conclusion reached by the agency officials' (*T.C. Bateson Construction Co. v. United States*, 140 Ct. Cl. 514, 518 (1960)), or evidence which could convince an unprejudiced mind of the truth of the facts to which the evidence is directed'. (*Koppers Co. v. United States*, 186 Ct. Cl. 142, 149, 405 F.2d 554, 558 (1968))." (A 14)

It should be noted that this test was uniformly applied to deny both USL's and SUN's challenges to the factual administrative determination of the number of delay days attributable to change orders Nos. 23 and 48. (A 12 and A 15).

Petitioner's claim that "only SUN presented substantial evidence" is clearly error as a reading⁴ of the opinions of the Court of Claims, the Secretary of Commerce and of the Maritime Subsidy Board demonstrates.⁵

⁴ For example and as pertinent to the two issues argued in SUN's Petition, conflicting substantial evidence is described by the Court of Claims at A 3, A 16 & 17 and by the Board at A 68, A 72-78, A 107-111.

⁵ SUN fails to consider further that it must carry the affirmative burden of proving its claim by more than self-serving conclusory testimony. *Northbridge Electronics, Inc. v. U.S.*, 444 F.2d 1124, 1128 and 1129 (Ct. Cl. 1971); *Electronics and Missile Facilities, Inc. v. U.S.*, 416 F.2d, 1345, 1355 (Ct. Cl. 1969); *Sternberger v. U.S.*, 401 F.2d 1012, 1016 (Ct. Cl. 1968); *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197, 229, 59 S.Ct. 206, 216 (1938); *Wm. A. Smith Contracting Co. v. U.S.*, 412 F.2d 1325, 1331 (Ct. Cl. 1969).

CONCLUSION

SUN's rather lengthy petition presents nothing more than a re-hash of its view of the evidence of record. There has been no showing that the Court of Claims misapplied the substantial evidence requirement of Section One of the Wunderlich Act to any degree whatsoever in affirming the final administrative award of change costs. It is clear that Petitioner's dissatisfaction with the ultimate findings of fact in this case raises no issue which could warrant review by this Court in the exercise of its sound judicial discretion under Supreme Court Rule 19.

It is therefore respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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